

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

**SAMSON TUG AND BARGE CO., INC.,**  
an Alaska Corporation

Plaintiff/Appellant

VS.

UNITED STATES OF AMERICA,

Defendant/Appellee.

Case Number: A03-006 CV  
Admiralty JWS

## PLAINTIFF'S MOTION IN LIMINE

Plaintiff, by undersigned counsel, hereby moves for an order in limine, precluding Defendant from offering evidence in two areas based on its conduct in discovery and its failure to preserve certain records. The order in limine sought herein has two aspects, as follows:

1. Precluding Defendant from calling witnesses to offer testimony in an area as to which discovery, including properly noticed 30(b)(6) depositions, was sought unsuccessfully by Plaintiff; and
2. Precluding Defendant from relying on theories and positions which would have been either supported or refuted by documentary records known to have existed at one time in the sole possession of the government, and sought unsuccessfully by Plaintiff.

## Background

This case arises from a government contract between Plaintiff, Samson Tug and Barge Co., Inc. (“Samson”) and the United States (“Government”) whereby Samson contracted to provide barge transportation of cargo to and from the Government’s defense installation at Adak, Alaska for the period October 1, 1995 through September 30, 1997 (“the Contract”). The Contract was a requirements contract whereby the Government agreed to ship all cargo suitable for barge transportation with Samson (subject to certain limited exceptions not at issue here). In

breach of the Contract, a substantial amount of cargo, the exact amount of which remains unknown (and for reasons set forth below, unknowable), which was suitable for barge transportation was shipped by air, depriving Samson of revenue to which the Contract entitled it.

**The Factual and Legal Bases for Samson's Motion In Limine**

1. **The Government's Failure to Produce Documents Pertaining to, or A Witness Responsible For, The Decisions to Ship Barge-Suitable Cargo by Air.**

Since the earliest stages of discovery in this case, Samson has sought to depose, through 30(b)(6) depositions, Government officials responsible for making decisions regarding the mode of transportation of cargo, i.e., barge versus air, to and from Adak during the Contract period.<sup>1</sup> Samson has also sought the production of documents relating to such decisions. The Government has failed to produce for deposition any witnesses purporting to have first-hand knowledge of the facts and circumstances surrounding these decisions. Additionally, the Government has failed to produce documents reflecting the facts and circumstances surrounding those decisions.

Discovery has now closed by virtue of this Court's Order. It would be fundamentally unfair, and a violation of the Government's discovery obligations, for the Government to be allowed to produce for the first time at trial either witnesses to testify as to or documents relating to the facts and circumstances surrounding these mode of transportation decisions.

Federal Rule of Civil Procedure 37(c)(1) provides that:

A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition or in lieu of this sanction, the court,

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<sup>1</sup> The pertinent pages from the 30(b)(6) notice are attached as Exhibit 1.

on motion and after affording an opportunity to be heard, may impose other appropriate sanctions.

F.R.C.P. 37(c)(1) 2008.

Where, as here, a party fails to disclose requested information, the appropriate remedy is to preclude that party from presenting such information at trial. *Pharmacia Corp. Motor Carrier Services Corp.*, slip copy 2007 WL 1816044 (D.N.J. 2007). Sanctions under Rule 37(c)(1) do not require a showing of bad faith or a violation of a court order. *Yeti by Molly, Ltd. V. Deckers Outdoor Corp.*, 259 F.3d 1101, 1108 (9th Cir. 2001). The sanction of precluding the undisclosed evidence is self-executing or automatic. *See Id.*

The Government never produced a witness to testify on deposition regarding decisions over which mode to ship cargo, a critical issue in the case, despite numerous and unequivocal requests. The Government's failure to provide a FRCP 30(b)(6) witness is a reason to preclude the evidence which is the subject of this Motion. *See Veritas Operating Corp. v. Microsoft Corp.*, slip copy 2008 WL 657936 (W.D. Wash. 2008); *Colbert v. City of Nevada City*, slip copy 2007 WL 3010424 (E.D. Cal. 2007); *Estate of Wallace v. City of Los Angeles*, 229 F.R.D. 163 (C.D. Cal. 2005); *United States v. Phillip Morris*, slip copy 2005 WL 729434 (D.D.C. 2005) (finding that failure to produce knowledgeable 30(b)(6) witness or responsive 30(b)(6) testimony precluded use of evidence that was requested through 30(b)(6) deposition).

2. The Government's Failure to Produce Full and Complete Records of Flights to and from Adak during the Contract Period.

As early as June, 1997, during the Contract period, when Samson came to believe that the Government was diverting barge-suitable cargo to air transportation, up to and including last year, Samson has sought records that would show the following:<sup>2</sup>

1. All the air flights to and from Adak during the Contract period;
2. A description of the cargo shipped by the Government on these air flights;
3. The volume of cargo shipped by the Government on these air flights.

While some records showing incomplete information regarding the foregoing have been intermittently produced, the production has fallen far short of being comprehensive on this cardinal issue. While the incomplete records are sufficient to demonstrate that material diversion of cargo from the mode contractually required did occur, the records do not remotely suffice to permit a complete analysis of the amount of diverted cargo.

It is clear that such records existed at one time. All cargo carrying flights to and from Adak were accompanied by cargo manifests describing the cargo and setting forth its volume.<sup>3</sup> These manifests have not been produced and apparently cannot be, or at least have not been located, nor have other records that comprehensively contain the same information, although partial compilations of data from some of the underlying records have been produced.

A party's duty to preserve records begins before it has actual notice of litigation, but when it has notice that the evidence is relevant to present or future litigation. *Fujitsu Ltd. v.*

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<sup>2</sup> See Exhibit 2 consisting of FOIA requests to various Government agencies concerning such records. In addition, Samson filed numerous other FOIA requests seeking those records in 2000 and 2001 and has persistently sought such records through discovery in this case. In response to the second FOIA request the Government created and produced a computer generated chart entitled "FOIA Request Adak, Alaska Movement," suggesting that source documentation for the creation of the chart must have existed at that time. It was not produced, however. Exhibit 3.

<sup>3</sup> Several Government witnesses have so testified in depositions.

*Federal Express Corp.*, 247 F.3d 423, 436 (2nd Cir. 2001). In the context of a government contracts claim under the Contract Disputes Act, notice of future litigation may occur, as it did in this case, well before receipt of a claim by the contracting officer, “but also . . . [during] that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.” *Renda Marine, Inc. v. United States*, 58 Fed. Cl. 57, 60 (2003), quoting *Silvestri v. General Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001); see also *AAB Joint Venture v. United States*, 75 Fed. Cl. 432, 440 (2007) (finding duty to preserve evidence that may be relevant to anticipated litigation). As applied to the facts at hand, given Samson’s surfacing of the issue of possible breach through diversion during performance of the contract, and its related FOIA requests, the Government was put on notice regarding the possibility, indeed the likelihood, of future litigation and the need to preserve the records that are the subject matter of this Motion.

Courts in this Circuit have “broad discretionary power to permit a jury to draw an adverse inference from the destruction or spoliation against the party or witness responsible for that behavior.” *Glover v. Bic Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993), citing *Akiona v. United States*, 938 F.2d 158 (9th Cir. 1991). Moreover, the law in this Circuit does not require a finding of bad faith as a prerequisite to such an inference, but rather “simple notice of ‘potential relevance to the litigation.’” *Id.* The rationale behind sanctions for spoliation is twofold. It prevents a party that destroyed evidence from benefiting from it and it deters such conduct in the future. *Akiona*, at 160.

This discretion to order sanctions is by no means limited to jury trials. A recent case from the United States Court of Federal Claims, also involving a bench trial for a Contract Disputes Act claim, provides a good example of a spoliation remedy in the context of a

government contracts diversion case. *United Medical Supply Co. v. United States*, 77 Fed. Cl. 257 (2007). United Medical Supply (hereinafter “UMS”) entered into a requirements contract with an agency of the Department of Defense to provide medical supplies for a number of Medical Treatment Facilities in the Texas and Oklahoma. *Id.* at 259. When UMS discovered that the Government was breaching its contract by diverting required purchases from it to other vendors, it initiated legal action to include filing a FOIA request to determine the extent of the diversion. *Id.* Despite the FOIA request and a complaint based on a bankruptcy claim that eventually made its way to the Court of Federal Claims, the Government did not take appropriate measures to notify all of the applicable facilities to preserve records of orders of medical supplies. *Id.* at 260-64. As a result, a number of facilities inadvertently destroyed relevant records before any sort of discovery request or order had been issued. *Id.* This rendered UMS unable to determine how much of the orders for medical supplies were diverted in breach of its contract. Finding a lack of appropriate diligence in ensuring preservation of the records, the Court sanctioned the Government by prohibiting the Government from cross-examining UMS’s expert “to the extent he or she . . . attempts to extrapolate the total number of diversions.” *Id.* at 276. Likewise, the Court prohibited the Government’s expert from testifying based on the destroyed evidence as well as ordering payment of costs related to the spoliation to UMS. *Id.*

Similarly, with Samson, the Government knew that records relating to diverted cargo were an issue even before the Contract concluded. Despite the obvious signals, it appears that not only were the Government’s efforts to preserve records insufficient, there is no indication that the Government undertook any efforts to preserve records whatsoever.<sup>4</sup> The records to

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<sup>4</sup> Despite being served with Interrogatories requesting a detailed explanation as to the Government’s actions in preserving and locating missing records, no satisfactory explanation has been provided.

prove Samson's claim in its entirety existed at one time and they existed at a time when it should have been obvious that such records might be relevant to anticipated litigation.

In response to the FOIA requests, the DOD produced a compilation of data about air cargo flights and volumes of cargo carried on some, but not all of those flights, but the underlying records or data from which that compilation was drawn were never produced. Similarly, in the course of discovery, the Government produced some additional incomplete compilations, again without producing the complete underlying records or database from which they were drawn. Thus, the Government has made it impossible for Samson to determine whether the compilations are accurate or complete, and has precluded Samson from accessing the more comprehensive data in the underlying records, such as cargo manifests, that would show how much and what types of cargo were transported by air. Just as in *United Medical Services*, when a party cannot locate records known to have existed at one time when it was on notice of anticipated litigation, and when those records are as important to the case as the missing records are to this one, a sanction similar to the one imposed in the UMS case is appropriate.

In other government contracts decisions involving the scope of the Government's breach by diversion, the adequacy of records has been a recurring problem. While not addressing the issue in terms of sanctions for spoliation, decisions have had the effect of prohibiting the Government from taking advantage of the lack of records in assessment of damages. The overriding principle in diversion cases lacking sufficient records is that "[i]f a reasonable probability of damage can be clearly established, uncertainty as to the amount will not preclude recovery,' and the board's duty is to 'make a fair and reasonable approximation of the damages.'" *Ace Federal Reporters v. Barram*, 226 F.3d 1329, 1333 (Fed. Cir. 2000) *quoting*

*Locke v. United States*, 283 F.2d 521, 524 (1960). See also *T&M Distributors*, ASBCA No. 51279, 2001-2 B.C.A. ¶ 31,442, June 5, 2001; *Pacific Technical Enterprises, Ltd.*, ASBCA No. 17087, 74-2 BCA ¶ 10679, June 5, 1974.

Based on the foregoing, Plaintiff requests that the Court rule in limine that the Government be precluded from 1) calling any witness to testify based on first hand knowledge as to the facts and circumstances surrounding the decision as to mode of transportation, and 2) presenting any theory of defense as to liability or damages that would be either supported by, or possibly refuted by, the missing documents concerning cargo shipped by air.

### **CONCLUSION**

For the foregoing reasons, Plaintiff hereby moves for an order in limine.

Respectfully submitted,

Dated: March 31, 2008

/s/ Richard D. Gluck  
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**CERTIFICATE OF SERVICE**

I hereby certify that on March 31, 2008, a copy of Plaintiff's Motion In Limine was served by first class mail, postage prepaid to the following:

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/s/ Richard D. Gluck  
Richard D. Gluck